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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

FRANCES C. GANTONG-RUIZ,

Plaintiff and Respondent,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS,

Defendant and Appellant.

F040953 and F042643

(Super. Ct. No. 56072)

OPINION

APPEALS from judgments of the Superior Court of Madera County. Thomas L. Bender, Judge.

Lozano Smith, Jerome M. Behrens, Gregory A. Wedner and David A. Moreno for Defendant and Appellant.

Paul N. Halvonik for Plaintiff and Respondent.

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This appeal primarily concerns the scope of the term “marital status” in the context of an employment discrimination claim. The issue is whether alleged discriminatory treatment is actionable when it is based on the claimant being married to a particular person as opposed to simply being married. Respondent, Frances

Gantong-Ruiz (Gantong), claimed that her employer, the California Department of Corrections (CDC), subjected her to discrimination once CDC began investigating misconduct allegations against Gantong's husband and coworker, Richard Ruiz (Ruiz).

In the previous appeal, this court concluded that Gantong had presented sufficient evidence to survive a nonsuit on her claim for marital discrimination. However, the opinion was limited to the issue of whether CDC had reasonably regulated, for reasons of supervision, safety, security, or morale, the working of Gantong and Ruiz in the same facility. Consequently, we did not reach the issue of whether the definition of marital status includes not only those situations in which an employee is discriminated against for either being married or single, but also those in which an employee is discriminated against because of the identity or conduct of his or her spouse.

Now, following a second trial, CDC contends the verdict in favor of Gantong must be reversed. According to CDC, the jury was improperly instructed that a claim of marital status discrimination can be based on the identity of one's spouse. CDC further argues that Gantong was precluded from pursuing a gender harassment or discrimination theory on retrial based on this court's previous ruling.

As discussed below, Gantong's claim that she was subjected to unfair treatment because she was married to Ruiz cannot support a finding of marital status discrimination. Moreover, although Gantong was not precluded from retrying her gender discrimination or harassment cause of action, the evidence does not support such a claim as a matter of law. Therefore, the judgment will be reversed.

BACKGROUND

Gantong and Ruiz were married in 1985. In 1990, both were hired by CDC and placed at the Central California Women's Facility (CCWF). Ruiz worked as a prison guard. In March 1993 Gantong was assigned to the Investigative Services Unit (ISU)

as an investigator and evidence officer. Narcotic interdiction was Gantong's primary responsibility.

Gantong was very successful in performing her job. Her investigations led to the interception of relatively large quantities of drugs and the severing of numerous outside drug connections.

Toward the end of 1993, the head of ISU, Cagie Brown, gave Gantong a key to her office. The purpose was to provide Gantong access to Brown's office on weekends without disturbing Brown.

In February 1994, Gantong was selected as CCWF's employee of the month. To commemorate this honor, Gantong received a plaque. She also had the use of a special parking place for the month. Gantong accepted these benefits without complaint. However, as an employee of the month, Gantong was also profiled in the staff newsletter. At trial, Gantong testified that she did not want this recognition. Gantong was concerned that the publication of personal information could jeopardize her security. Although the newsletter was not circulated to inmates, inmates were involved in its production.

After the employee of the month article was published, ISU learned that it was slated to receive a drug-detecting canine for CCWF. However, the dog did not arrive.

Since Gantong was so successful in detecting and intercepting drugs, she was jokingly referred to as the dog of the unit. As a tribute to Gantong and to illustrate this in-house joke, Brown removed a drug-detecting canine picture from a training booklet and superimposed Gantong's face over the dog's face. This picture was labeled "Employee of the month."

At an ISU potluck dinner, Brown exhibited the dog picture. The warden, Teena Farman, and the chief deputy warden, Lewis Kuykendall, were in attendance. The assistant head of ISU, Rick Allen, was also present. This picture amused everyone except Gantong. Rather, Gantong testified that she was embarrassed and humiliated.

Copies of the dog picture were affixed to the bulletin boards in Brown's, Allen's, and Gantong's offices. Gantong took the picture down from her office approximately two weeks later.

While assigned to ISU, Gantong, Brown and others socialized outside of CCWF. In fact, in early 1994, Gantong, Brown and another correctional officer planned a future weekend trip to Lake Tahoe.

In May 1994 allegations that Ruiz had engaged in sexual misconduct with inmates surfaced. The warden directed Brown to begin an investigation of Ruiz. Brown and Allen conducted the investigation together.

Brown testified that the investigation caused her to feel awkward and uncomfortable around Gantong. In an effort to be professional and objective, Brown distanced herself from Gantong. This included withdrawing from the Lake Tahoe trip.

Gantong resented the change in her relationship with Brown. She felt that the investigation of her husband was causing her to be treated unfairly. For example, Brown diverted Gantong to duties other than investigations. Rather than monitor inmate phone calls, Gantong was instructed to clean and organize the evidence room. Gantong considered this assignment degrading. She testified that she "went from an investigator to a cleaning woman." Brown further asked Gantong to return the key to her office.

At trial, Gantong also described certain comments voiced by Brown that she characterized as harassment. According to Gantong, Brown began making threatening statements. Gantong testified that Brown callously told her "I'm going to the warden, Frances, to have you removed from ISU." During the same conversation, Brown cupped her hands and stated, "I feel like I have your family in the palm of my hand." Brown then moved her hands from side to side and said, "I have information that I can do this with or that with." Gantong also relayed how Brown said, in a hostile manner,

“Frances, you tell your husband to level with you,” and that “If you ever say this, I’ll deny it.”

Toward the end of June, Gantong felt that she could not take the harassment any longer and went on stress leave for three weeks. Within two days of returning from leave, Gantong requested and was granted a transfer out of ISU. In September 1994 Gantong was placed on sick leave and did not return until August 1996. Gantong ultimately transferred to another CDC facility. Ruiz was terminated from CDC employment in September 1994.

Ruiz and Gantong filed an action against CDC in May 1995 claiming discrimination based on national origin, sex, and marital status. The case went to trial in September 1996. On the first day of trial, CDC’s motion for judgment on the pleadings against Ruiz was granted on the ground that he had failed to exhaust his administrative remedies. At the close of Gantong’s case, the trial court granted CDC’s motion for nonsuit concluding that Gantong had failed to produce any evidence of discrimination.

This court reversed the judgment on appeal (F027340 [hereinafter *Ruiz I*]). We held that Ruiz had exhausted his administrative remedies. Further, with respect to whether Gantong had been discriminated against based on her marital status we found Government Code¹ section 12940, subdivision (a)(3)(A), was controlling and concluded that Gantong had presented enough evidence to submit the issue of whether Brown had acted unreasonably to the jury. However, the opinion did not reach the issue of whether the definition of marital status includes those situations in which an employee is discriminated against because of the identity or conduct of his or her spouse.

¹ All further statutory references are to the Government Code.

Thereafter, the case went to trial for the second time. At the conclusion of the evidence, the jury was instructed on two theories of recovery for Gantong, disparate treatment and hostile environment, premised on gender and/or marital status. During deliberations, the jury asked the court whether marital status referred to Gantong being married to Ruiz or just being married. Over CDC's objection, the court eventually answered this question with "married to Richard Ruiz."

Also over CDC's objection, a general verdict form was given to the jury. The jury returned a defense verdict on all of Ruiz's claims. The jury found in favor of Gantong and awarded her approximately \$148,000 in economic damages and \$186,400 in noneconomic damages. Attorney fees were also awarded.

DISCUSSION

1. *A marital status discrimination claim cannot be based on the identity of one's spouse.*

The theory underlying Gantong's marital status discrimination claim is that she was unfairly treated only because she was married to Ruiz. As noted above, Gantong and Ruiz were married when they were hired by CDC and started working together at CCWF in 1990. The alleged disparate treatment of Gantong did not begin until Ruiz was accused of misconduct in 1994.

Section 12940, subdivision (a), prohibits an employer from discriminating against a person because of that person's "marital status." However, subdivision (a)(3)(A) provides that nothing in the California Fair Employment and Housing Act (FEHA) relating to marital status discrimination shall "[a]ffect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility"

In *Ruiz I* we focused on section 12940, subdivision (a)(3)(A), due to the fact that Gantong and Ruiz were coworkers. We concluded that Gantong had presented sufficient evidence to withstand a nonsuit on the issue of whether Brown reasonably

regulated Gantong's work environment after ISU began investigating Ruiz. In other words, the trial court should have submitted the question of whether Brown's actions were unreasonable to the jury. However, as stated in the opinion, we did not reach the issue of whether the definition of marital status includes not only those situations in which an employee is discriminated against for either being married or single, but also those in which an employee is discriminated against because of the specific identity or conduct of his or her spouse.

CDC argues that Gantong cannot recover for marital status discrimination because the claim is based solely on her being married to a specific person as opposed to her state of being married. Therefore, CDC contends that the jury was incorrectly instructed when the court informed it that marital status referred to Gantong being married to Ruiz.

In contrast, Gantong takes the position that the jury was properly instructed under *Ruiz I*. Gantong interprets *Ruiz I* as holding that the unreasonable regulation of married coworkers alone will give rise to a marital status discrimination claim. In other words, disparate treatment engendered by the identity or conduct of an employee's coworker spouse can be the basis for such a discrimination finding. According to Gantong, this rule must also be applied here because it is the law of the case.

Under the law of the case doctrine, “the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case.” (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 301.) However, the doctrine does not apply to points of law that might have been, but were not determined on the prior appeal. (*Id.* at p. 302.) Moreover, since the doctrine is a rule of procedure, it does not alter the court's power and will not be given effect

where its application will result in an unjust opinion. (*Cooper v. County of Los Angeles* (1977) 69 Cal.App.3d 529, 536.)

In *Ruiz I* this court's decision was limited. We concluded that the question of whether an employer's regulation of married coworkers is reasonable and therefore not an unlawful employment practice under section 12940, subdivision (a)(3)(A), should be submitted to the trier of fact. A finding of reasonableness defeats the employee's claim. However, a finding that such regulation is unreasonable is not, in itself, equivalent to a finding of marital status discrimination. Rather, the reasonable versus unreasonable determination is merely the first step in the analysis. Since this step was not reached in *Ruiz I*, we did not decide the second step, i.e., whether the alleged discrimination can be founded on the identity of the employee's spouse. Therefore, the law of the case doctrine does not come into play on this issue.

Moreover, contrary to Gantong's position, the language of section 12940, subdivision (a)(3)(A), does not resolve this question. While this subdivision does apply to a more narrowly defined set of employees, i.e., married coworkers, it is still based on marital status, not on the specific identity or actions of one's spouse.

It is apparent that *Ruiz I* misled the trial court on the parameters of "marital status." As noted above, we reversed and remanded the judgment against Gantong on the ground that the jury should have determined whether Brown's actions were unreasonable. Understandably, one could interpret this holding as implying that marital status discrimination includes disparate treatment based on the identity of one's spouse. However, this implication was not essential to the *Ruiz I* decision. Thus, in this appeal, we are not precluded from considering whether marital status extends to the status of being married to a particular person. (Cf. *Estate of Roulac* (1977) 68 Cal.App.3d 1026, 1030-1031.)

After *Ruiz I* was decided, the Fourth District considered this issue in *Chen v. County of Orange* (2002) 96 Cal.App.4th 926. There, the plaintiff alleged she had not

received favorable assignments while working as a deputy district attorney because she was married to a high-level management attorney who was not in the good graces of the Orange County District Attorney. The court affirmed the trial court's dismissal of the marital status discrimination claim concluding that the origin of any animus was political disfavor of the plaintiff's husband, not any antipathy toward the plaintiff's status as a married or single person.

In reaching this decision, the *Chen* court reviewed various out-of-state cases involving marital status discrimination claims. The general rule gleaned from these opinions is that marital *status* is independent of the *identity* of one's spouse. (*Chen v. County of Orange, supra*, 96 Cal.App.4th at p. 942.) As noted by one court, the purpose behind this law is to “prevent discrimination against classes of people, whether by age, race, ... marital status or any of the other classes protected by the statute.” However, it does not “extend to “the status of being married to a *particular* person.”” (*Id.* at p. 944.)

The *Chen* court also discussed what it termed “conduit” cases. In these situations, the plaintiff is the object of adverse action because of something *about* his or her spouse. Conduit cases fall into two categories, those in which the animus directed against the plaintiff's spouse is itself unlawful, and those in which the animus is not unlawful. For example, if a White woman is denied a permanent job position only because she is a White woman married to a Black man, the woman will have a valid cause of action because the adverse action is based on race. (*Chen v. County of Orange, supra*, 96 Cal.App.4th at p. 943.) However, conduit cases that are not based on wrongful animus, e.g., simple politics, have been universally rejected as valid marital discrimination claims. “In such cases, the marriage *qua* marriage is irrelevant to the adverse action taken by the employer.” (*Ibid.*) Rather, it is the substantive relationship between the plaintiff and someone else, be he or she spouse, romantic

partner, family member, or even “‘just a friend,’” that the employer cares about. (*Ibid.*)

In this case, Gantong’s claim falls into the “not wrongful animus” category. The adverse action taken against Gantong was based on her substantive relationship with a *particular* man, i.e., a correctional officer who was the subject of an internal investigation for sexual misconduct. The situation would have been the same had Ruiz been Gantong’s father or brother. The “marriage *qua* marriage” was irrelevant. Gantong and Ruiz had been working together while married for several years. Thus, it was not a change in marital status that precipitated the adverse action. Rather, the animus was wholly marriage-neutral. (*Chen v. County of Orange, supra*, 96 Cal.App.4th at p. 946.)

Consequently, the trial court erred when it informed the jury that marital status meant marriage to Ruiz. Moreover, in light of the theory underlying Gantong’s case, she cannot prevail on a marital discrimination claim as a matter of law.

2. The evidence does not support a gender discrimination or harassment claim.

CDC argues that *Ruiz I* precluded Gantong from pursuing a gender discrimination or harassment claim on retrial. In *Ruiz I* we noted that Gantong had not demonstrated that Brown’s behavior was motivated by race or gender. However, this conclusion was limited to events that occurred after the allegations against Ruiz surfaced. Thus, Gantong had the opportunity in the second trial to prove gender discrimination or harassment based on earlier events, i.e., the employee of the month award and the dog picture.

Courts have recognized two theories of liability for sex-based workplace harassment, quid pro quo and hostile or abusive environment. (*Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 1000.) Here, Gantong claimed gender harassment based on a hostile environment. Thus, it was necessary for

Gantong to show that she was subjected to intimidation and hostility for the purpose of interfering with her work performance and that had she been a man, she would not have been treated in the same manner. (*Id.* at p. 1001.) However, to be actionable, the harassment must be “‘sufficiently severe or pervasive’ to alter the conditions of the victim’s employment and create an abusive working environment.” (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 463.) The law’s prohibitions are not a “‘civility code’” designed to rid the workplace of vulgarity. (*Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 161.) Rather, the conduct must be extreme. Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to a change in the terms and conditions of employment. (*Etter v. Veriflo Corp., supra*, 67 Cal.App.4th at p. 463.)

The totality of the circumstances must be examined to determine whether the sexual harassment complained of is sufficiently pervasive to create a hostile or offensive work environment. (*Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142, 149-150.) The factors to be considered include the nature of the sexually harassing conduct; its frequency; its severity; the total number of days over which it occurred; the context in which it occurred; and whether it unreasonably interfered with the employee’s work performance. (*Id.* at p. 150; *Etter v. Veriflo Corp., supra*, 67 Cal.App.4th at p. 464.)

CDC’s act of naming Gantong as the “Employee of the month” cannot reasonably be characterized as harassing or discriminatory conduct. In fact Gantong testified that she did not believe her gender, race or marital status played any part in her selection for this honor. Thus, any claim for hostile environment gender harassment must rest on the dog poster incident.

In *Herberg v. California Institute of the Arts, supra*, the court was faced with an analogous situation. There, the plaintiff claimed a hostile work environment based on the display of a drawing that depicted the plaintiff and other faculty, staff and students

engaged in various sexual acts. This piece hung in the art school's main gallery for 24 hours and was seen by approximately 100 people.

Applying the “totality of the circumstances” factors, the *Herberg* court concluded that the display of the drawing did not constitute severe or pervasive sexual harassment as a matter of law. (*Herberg v. California Institute of the Arts, supra*, 101 Cal.App.4th at p. 150.) The court noted that a single incident of harassment might be sufficient. However, to establish liability it must be “severe in the extreme and generally must include either physical violence or the threat thereof.” (*Id.* at p. 151.) Further, the court found that while the plaintiff and her relatives were understandably upset and embarrassed, the drawing was not intended to harass the plaintiff, but rather to make a point about representational art. According to the *Herberg* court, no reasonable jury could conclude that the presence of the drawing in the main gallery constituted severe harassment within the meaning of the FEHA. (*Id.* at pp. 153-154.)

Similarly here, a reasonable jury could not have found that the dog poster constituted severe harassment. It was a single incident that was intended as a joke. The joke may have been in bad taste but, as noted above, the FEHA is not intended to insure civility in the work place. The production and presentation of this dog poster was certainly less severe than the display of the sexually explicit drawing in *Herberg*. Further, the fact that the poster remained on several bulletin boards in private offices for a period of time did not transform this single incident into pervasive harassment. Although Gantong may have been humiliated and embarrassed, the dog poster did not create a workplace that was so discriminatory and abusive that it would have interfered with a reasonable employee's work performance. (Cf. *Herberg v. California Institute of the Arts, supra*, 101 Cal.App.4th at p. 150.) Accordingly, viewing the facts in the light most favorable to Gantong, she cannot establish liability for gender harassment or discrimination as a matter of law.

3. *The order against CDC for attorney fees must be reversed.*

Section 12965, subdivision (b), authorizes the trial court to award reasonable attorney fees and costs to the prevailing party in an action brought under the FEHA. Here, such fees were awarded to Gantong. However, since Gantong is no longer the prevailing party, the attorney fee award must be reversed.

DISPOSITION

The judgment and the order for attorney fees are reversed. The trial court is directed to enter judgment in favor of appellant, California Department of Corrections.

Levy, J.

WE CONCUR:

Harris, Acting P.J.

Gomes, J.